

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

ZACATACOS INCORPORATED

And

Case Nos. 13-CA-261409  
13-CA-261410

JORGE MUJICA  
An Individual

*Helen Gutierrez, Esq.*, for the General Counsel.  
*T. Phillip Boggess, (LAW TPB, LLC, La Grange, Illinois)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom video technology on April 19, 2021. Jorge Mujica filed the charges in these cases on June 8, 2020 alleging that Respondent violated the Act in terminating the employment of Gloria Cabrera on May 25, 2020 and terminating the employment of Elia Delgado on May 26, 2020. The General Counsel issued a consolidated complaint in this matter on January 29, 2021.

For the reasons stated below, I conclude that Respondent violated the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent operates Mexican restaurants at 5 locations in Metropolitan Chicago, Illinois. In calendar year 2020, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Chicago facilities materials valued in excess of \$5,000 directly from points outside of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The alleged discriminatees, Gloria Cabrera and Elia Delgado worked as waitresses at Respondent's restaurant at 59<sup>th</sup> and South Pulaski in Metropolitan Chicago. Delgado was hired in 2017; Cabrera in 2018. With the advent of the COVID 19 pandemic, Respondent shifted to operating solely as a take-out restaurant. Cabrera and Delgado worked taking phone calls, preparing take-out orders, etc. For 2 weeks in April 2020, the restaurant closed completely.

On about May 2, 2020, Otildo Pluas (also known as Amador), the new manager at the 59<sup>th</sup> St. location called Cabrera and Delgado about returning to work. Both were given work for 3 days a week. Cabrera could only work evenings on Mondays; other days she could work only a morning shift.

On Sunday, May 24, a coworker texted the work schedule for the week of Monday, May 25 – Sunday, May 31 to a number of employees, including Cabrera and Delgado. The employees exchanged texts in which Cabrera and Delgado expressed their opinion that the schedule was unfair in that some newer employees were getting more hours and more desirable hours than they were getting. At one point, Cabrera described the schedule in a Spanish phrase that could be translated as “f—g bullshit.”

Otildo Pluas read the texts on the phone of Monica Chavez, his assistant. Pluas sent the employees a text telling them that if they had questions about the schedule they could talk to him about it the next day and the rest of the coming week.

Gloria Cabrera went to the 59<sup>th</sup> and Pulaski restaurant the next day, Monday, May 25, 2020. She was scheduled to work that day from 4 p.m. to closing time. Upon arriving, she discovered that Otildo Pluas had her timecard.<sup>1</sup> When she found Pluas they had a brief conversation in Spanish, the pertinent parts of which are as follows:

Cabrera...do I wait?

Pluas: No, You already know what happened yesterday; I had already spoken to you and when you came here, I told you only three days of work, maximum, 20 hours.

Cabrera: No, you did not tell me that. You asked me how many [hours] can you work and I told you, it is complicated for me to come in; since you told us that the schedule would rotate, and I told you, it is complicated for me to work in the afternoon; you told me, I am giving you part-time for now.

Pluas: That for now is because I cannot give you if you cannot work like that, there is no work and now, unfortunately, due to the situation yesterday, you no longer have work; leave me the hat, leave me the apron, and wait for your check when it is supposed to arrive, please.

Cabrera: And I mean, the only one who can tell me this is Primo or Mario.<sup>2</sup>

<sup>1</sup> He had apparently taken all the servers' timecards so as to comply with CDC requirements, such as taking their temperature, before allowing them to work.

<sup>2</sup> This refers to the prior manager at the 59<sup>th</sup> street location Roberto (aka Primo which means first cousin in Spanish) and Mario Acuna, the President or owner of Zacatacos.

Pluas: Okay, go talk to them and let me know, but you do not work here anymore, okay?

Cabrera: So well, Mario is going to know all about this and all the things that you are doing; he is going to know, okay?

G.C. Exh. 5 a-c.<sup>3</sup>

Pluas testified that what he meant in this conversation was that he could not change the schedule for the week of May 25-31. He also testified that he asked for Cabrera's cap and apron because he thought she was refusing to work the rest of that week.

Because of the conversation that they have the night before, the discussions that they had among themselves about the schedule, and they—that they were not agreeing to get you to talk to me directly.

Tr. 96.

This testimony is not a credible explanation for Pluas' assumption that Cabrera did not want to work anymore that week. However, it is a concession that his conduct on May 25 was motivated by animus towards the discriminatees' text exchange the night before.

Cabrera then called Robert (Primo) who had been the manager of the 59<sup>th</sup> Street restaurant before Pluas, to ask for his assistance. He told her he could not help her.

At 6:21 p.m. on May 25, Cabrera sent Pluas a text message asking for a termination letter, "I only want you to give me a letter with the reason why you fired me, with your contact information...", G.C. Exh. 6a-c. Pluas did not respond, nor did he deny that he received this text. Cabrera and Elia Delgado tried to make an appointment to talk to owner Mario Acuna on May 28, but they were unsuccessful. Respondent did not give Cabrera or Delgado a termination letter.

Pluas also testified that Cabrera was supposed to work on Wednesday, May 27 but did not show up. He testified that he asked Monica Chavez to call Cabrera. I find this testimony to be incredible for several reasons: 1) Pluas' failure to respond to Cabrera's May 25 evening text. If he had not fired her, he would have responded that Cabrera misunderstood him; 2) Chavez did not corroborate his assertion that he told her to call Cabrera to come to work again.

Elia Delgado went to the 59<sup>th</sup> street restaurant on Tuesday, May 26. She was scheduled to work that day from 4 p.m. to closing time. She had not been scheduled for work on Monday. Delgado testified that when she arrived, Pluas called her and told her to wait for him outside. After waiting for a while she went into the restaurant where Pluas told her that there was no more

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<sup>3</sup> The parties stipulated that the Spanish transcript and translation into English accurately reflect the conversation. Additionally, with my high-school level knowledge of Spanish and a Spanish-English dictionary, I listened to the recording several times. I did so to make sure that the cold transcript does not inaccurately represent the tenor of the conversation. My conclusion is that the transcript and translation accurately depict the substance of the conversation.

work for her. According to Delgado, Pluas shook a copy of the schedule and text messages at her and told her she had been disrespectful. Delgado testified also that she asked Pluas for a termination letter. He responded that she'd get one from Respondent's attorney. Delgado took her check and left the restaurant.

Pluas testified that he also told Delgado he could not change the schedule for the week of May 25-31. Then she got angry and left the restaurant. He concedes he saw Delgado in the restaurant parking lot where according to Pluas she threatened to sue him. Pluas testified that it was then that he removed Delgado from the schedule permanently. This testimony is also incredible. It is very unlikely that Delgado would have threatened to sue Pluas if all he said was that he could not change the schedule for that one week. I conclude that Pluas, on May 25 to Cabrera and on May 26 to Delgado made it very clear that these employees were being terminated. Pluas' testimony at Tr. 120-21 also makes it clear that Cabrera did not quit. I conclude that neither Cabrera nor Delgado would have been terminated but for Pluas' animus towards their text exchanges on the night of May 24.

### Legal Analysis

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging or otherwise discriminating against employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...* (Emphasis added)"

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line*, 251 NLRB 1083 (1980). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>4</sup>

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<sup>4 4</sup> In cases in which the employer's motive for allegedly discriminatory discipline is at issue, the *Wright Line* test applies regardless of whether the employee was engaged in union activity or other

Gloria Cabrera and Elia Delgado engaged in protected concerted activity when concertedly complaining about Respondent's work schedule and the number of hours they were scheduled to work. Respondent, by Otildo Pluas, was aware of these complaints and as exhibited by his conversations with Cabrera and Delgado, displayed animus towards their protected activity. He terminated them as a result of that animus.

#### Conclusion of Law

Respondent, Zacatacos, Incorporated, violated Section 8(a)(1) of the Act by discharging Gloria Cabrera on May 25, 2020 and discharging Elia Delgado on May 26, 2020.

#### REMEDY

The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also compensate Gloria Cabrera and Elia Delgado for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Respondent shall reimburse the discriminatees in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatees' backpay to the proper quarters on their Social Security earnings records. To this end, Respondent shall file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

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protected concerted activity, *Hoodview Vending Co.*, 362 NLRB 690 (2015); 359 NLRB 355 (2012).

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## Order

Respondent, Zacatacos, Incorporated, its officers, agents, successors, and assigns, shall

5        1) Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, including but not limited to exchanging text messages complaining about their work schedules.

10        (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

15        (a) Within 14 days from the date of the Board's Order, offer Gloria Cabrera and Elia Delgado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

20        (b) Make Gloria Cabrera and Elia Delgado whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

25        (c) Compensate Gloria Cabrera and Elia Delgado for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

30        (d) Compensate Gloria Cabrera and Elia Delgado for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(e) File with the Regional Director for Region 13 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

35        (f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify Gloria Cabrera and Elia Delgado in writing that this has been done and that the discharges will not be used against them in any way.

40        (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(h) Within 14 days after service by the Region, post at its Metropolitan Chicago, Illinois facilities copies of the attached notice marked "Appendix" in both English and in Spanish.<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically in both English and in Spanish, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in both English and in Spanish to all current employees and former employees employed by the Respondent at any time since May 25, 2020.<sup>7</sup>

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 23, 2021



Arthur J. Amchan  
Administrative Law Judge

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>7</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, including exchanging text messages about your work schedules.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Gloria Cabrera and Elia Delgado full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Gloria Cabrera and Elia Delgado whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Gloria Cabrera and Elia Delgado for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 13 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Gloria Cabrera and Elia Delgado for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Gloria Cabrera and Elia Delgado, and WE WILL, within



3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

ZACATACOS INCORPORATED

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-5208  
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/0](http://www.nlr.gov/case/0) -CA- or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.